

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LESLIE R. ENGELHART,)	
)	No. CV-07-3028-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR
MICHAEL J. ASTRUE,)	ADDITIONAL PROCEEDINGS
Commissioner of Social)	PURSUANT TO SENTENCE
Security,)	FOUR 42 U.S.C. § 405(g)
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 19.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to sentence four of 42 U.S.C. 405(g).

Plaintiff filed applications for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on October 15, 2004, alleging disability as of October 13, 2004, due to back pain,

1 herniated disc, arthritis and scoliosis. (Tr. 69, 105.) Following
2 a denial of benefits at the initial stage and on reconsideration, a
3 hearing was held before Administrative Law Judge (ALJ) Mary Bennett
4 Reed on September 12, 2006. On December 4, 2006, ALJ Reed denied
5 benefits; review was denied by the Appeals Council. This appeal
6 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
7 405(g).

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 The decision of the Commissioner may be reversed only if
12 it is not supported by substantial evidence or if it is
13 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
14 1097 (9th Cir. 1999). Substantial evidence is defined as
15 being more than a mere scintilla, but less than a
16 preponderance. *Id.* at 1098. Put another way, substantial
17 evidence is such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
20 evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment
22 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
23 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
24 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

23 SEQUENTIAL PROCESS

24 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
25 requirements necessary to establish disability:

26 Under the Social Security Act, individuals who are
27 "under a disability" are eligible to receive benefits. 42
28 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any

1 medically determinable physical or mental impairment"
 2 which prevents one from engaging "in any substantial
 3 gainful activity" and is expected to result in death or
 4 last "for a continuous period of not less than 12 months."
 5 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 6 from "anatomical, physiological, or psychological
 7 abnormalities which are demonstrable by medically
 8 acceptable clinical and laboratory diagnostic techniques."
 9 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

10 In evaluating whether a claimant suffers from a
 11 disability, an ALJ must apply a five-step sequential
 12 inquiry addressing both components of the definition,
 13 until a question is answered affirmatively or negatively
 14 in such a way that an ultimate determination can be made.
 15 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 16 claimant bears the burden of proving that [s]he is
 17 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 18 1999). This requires the presentation of "complete and
 19 detailed objective medical reports of h[is] condition from
 20 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 21 404.1512(a)-(b), 404.1513(d)).

17 STATEMENT OF FACTS

18 The facts of the case are set forth in detail in the transcript
 19 of proceedings, and are briefly summarized here. Plaintiff was 33
 20 years old at the time of the administrative hearing. (Tr. 222, 285.)
 21 He had a tenth-grade education with some special education classes.
 22 (Tr. 289.) He was married and lived in a trailer with his spouse and
 23 three-year-old child. (Tr. 290, 312.) While his spouse worked, his
 24 mother-in-law came over to help him care for the child; his neighbor
 25 did the yard work. (Tr. 311-12.) Plaintiff had past work
 26 experience as a produce packer, construction worker, dishwasher,
 27 laborer, construction equipment operator, and cashier/stocker. (Tr.

1 50, 335-36.) Plaintiff testified he could not work because of
2 ongoing pain in his lower and middle back that shoots down his legs.
3 (Tr. 290.) He stated he could lift and carry about 20 pounds, and
4 "was limited" in his ability to pick up his son, who weighed 35
5 pounds at the time of the hearing. (Tr. 311-12.) He testified he
6 could sit for about an half hour, walk less than one block and stand
7 about 10 minutes at a time before he started hurting. (Tr. 292-93.)

8 **ADMINISTRATIVE DECISION**

9 The ALJ found Plaintiff was insured for DIB through the date of
10 the decision. At step one, she found Plaintiff had not engaged in
11 substantial gainful activity. She determined Plaintiff had the
12 severe impairments of "degenerative disk disease of the lumbar spine
13 and borderline intellectual functioning." (Tr. 17.) At step
14 three, she found these impairments did not meet or equal impairments
15 listed in 20 C.F.R. Part 404, Subpart P, Appendix I (the Listings).
16 At step four, the ALJ determined Plaintiff had the residual
17 functional capacity (RFC) for a reduced level of light work,
18 "occasional lifting less than 20 pounds frequent lifting or carrying
19 of 10 pounds, sitting for 6 hours, and standing/walking for 6 hours
20 in an 8 hour workday, with normal breaks and only occasional
21 stooping and crouching." Plaintiff was found to be "limited to work
22 that involves understanding, remembering and carrying out simple
23 repetitive tasks, and no more than 3rd grade reading level and 8th
24 grade math level." (Tr. 18.) Finding Plaintiff unable to perform
25 his past relevant work, the ALJ proceeded to step five. Vocational
26 expert Dennis Elliot testified. (Tr. 334-39.) Based in part on
27 vocational expert testimony, the ALJ concluded Plaintiff could

1 perform other work in the national economy such as small products
2 assembler, photographic finisher and seedling sorter. (Tr. 336-37.)
3 She found Plaintiff was not "disabled" as defined by the Social
4 Security Act through the date of the decision. (Tr. 19.)

5 ISSUES

6 The question presented is whether there was substantial
7 evidence to support the ALJ's decision denying benefits and, if so,
8 whether that decision was based on proper legal standards.
9 Plaintiff contends the ALJ erred when she (1) found his somatoform
10 pain disorder was not severe at step two; (2) improperly rejected
11 treating and examining physician opinions; (3) improperly discounted
12 Plaintiff's testimony and lay witness testimony; and (4) did not
13 meet the Commissioner's burden at step five. (Ct. Rec. 14 at 9.)

14 DISCUSSION

15 Plaintiff contends the medical evidence submitted regarding his
16 diagnosed pain disorder is sufficient to satisfy the "*de minimis*"
17 threshold at step two, the ALJ's error at step two tainted the
18 entire sequential evaluation and, thus, is grounds for reversal.

19 At step two of the sequential process, the ALJ must determine
20 whether a claimant suffers from a "severe" impairment, *i.e.*, one
21 which has more than a slight effect on the claimant's ability to
22 work. To satisfy step two's requirement of a severe impairment, the
23 claimant must prove the existence of a physical or mental impairment
24 by providing medical evidence consisting of signs, symptoms, and
25 laboratory findings; the claimant's own statement of symptoms alone
26 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms
27 must be evaluated on the basis of a medically determinable

1 impairment which can be shown to be the cause of the symptoms. 20
2 C.F.R. §§ 404.1529, 416.929. Once medical evidence of an underlying
3 impairment has been shown, medical findings are not required to
4 support the alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d
5 341, 345 (9th Cir. 1991). However, an overly stringent application
6 of the severity requirement violates the statute by denying benefits
7 to claimants who do meet the statutory definition of disabled.
8 *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
9 Commissioner has passed regulations which guide dismissal of claims
10 at step two. Those regulations state an impairment may be found to
11 be "non-severe" only when evidence establishes a "slight
12 abnormality" that has "no more than a minimal effect on an
13 individual's ability to work." *Id.* (citing *Social Security Ruling*
14 (SSR) 85-28). The ALJ must consider the combined effect of all of
15 the claimant's impairments on the ability to function, without
16 regard to whether each alone was sufficiently severe. See 42 U.S.C.
17 § 423(d)(2)(B)(Supp. III 1991). The step two inquiry is a *de*
18 *minimis* screening device to dispose of groundless or frivolous
19 claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987).

20 The adjudicator's role at step two is further explained by SSR
21 85-28:

22 A determination that an impairment(s) is not severe
23 requires a careful evaluation of the medical findings
24 which describe the impairment(s) and an informed judgment
25 about its (their) limiting effects on the individual's
26 physical and mental ability(ies) to perform basic work
27 activities; thus, an assessment of function is inherent in
28 the medical evaluation process itself. At the second step
of sequential evaluation, then, medical evidence alone is
evaluated in order to assess the effects of the
impairment(s) on ability to do basic work activities.

1 . . .

2 If . . . evidence shows that the person cannot perform his
3 or her past relevant work because of the unique features
4 of that work, a denial at the "not severe" step of the
5 sequential evaluation process is inappropriate. The
6 inability to perform past relevant work in such instances
7 warrants further evaluation of the individual's ability to
8 do other work considering age, education and work
9 experience.

10 SSR 85-28. The regulations thus advise the adjudicator that
11 "[g]reat care should be exercised in applying the not severe
12 impairment concept." *Id.*

13 In determining whether a claimant has a severe impairment the
14 ALJ must evaluate the medical evidence submitted and explain the
15 weight given to the opinions of accepted medical sources in the
16 record. The regulations distinguish among the opinions of three
17 types of accepted medical sources: (1) sources who have treated the
18 claimant; (2) sources who have examined the claimant; and (3)
19 sources who have neither examined nor treated the claimant, but
20 express their opinion based upon a review of the claimant's medical
21 records. 20 C.F.R. § 416.927. A treating physician's opinion
22 carries more weight than an examining physician's, and an examining
23 physician's opinion carries more weight than a reviewing or
24 consulting physician's opinion. *Lester v. Chater*, 81 F.3d 821, 830
25 (9th Cir. 1995). The treating physician's opinion is given special
26 weight because she is employed to cure and has a greater opportunity
27 to observe the claimant's physical condition. *Fair v. Bowen*, 885
28 F.2d 597, 604-05 (9th Cir. 1989); *Murray v. Heckler*, 722 F.2d 499,
502 (9th Cir. 1983).

If a treating physician's opinions are not contradicted, they

1 can be rejected only with "clear and convincing" reasons. *Lester*,
2 81 F.3d at 830. If contradicted, the ALJ may reject the opinion if
3 he states specific, legitimate reasons that are supported by
4 substantial evidence. *Flaten v. Secretary of Health and Human*
5 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605.
6 "As is the case with the opinion of a treating physician, the
7 Commissioner must provide 'clear and convincing' reasons for
8 rejecting the uncontradicted opinion of an examining physician."
9 *Lester*, 81 F.3d at 830 (citation omitted). If the opinion is
10 contradicted, it can only be rejected for specific and legitimate
11 reasons that are supported by substantial evidence in the record.
12 *Andrews*, 53 F.3d at 1043. A medical specialist's opinion generally
13 is given more weight than that of a medical source who is not a
14 specialist. 20 C.F.R. §§ 404.1527(d)(5), 416.927 (d)(5).

15 Historically, the courts have recognized conflicting medical
16 evidence, the absence of regular medical treatment during the
17 alleged period of disability, and the lack of medical support for
18 doctors' reports based substantially on a claimant's subjective
19 complaints of pain as specific, legitimate reasons for disregarding
20 the treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair*,
21 885 F.2d at 604.

22 Here, Plaintiff submitted a diagnostic neuropsychological
23 evaluation by examining psychologist, Jody Veltkamp, Psy.D., dated
24 July 10, 2006. (Tr. 222-30.) Dr. Veltkamp's speciality is clinical
25 neuropsychology. (Tr. 230.) The evaluation was requested by the
26 Washington State Division of Vocational Rehabilitation for the
27 purpose of determining "the possible presence of impairments in
28

1 higher cortical functioning of the brain." (Tr. 222.) The
2 examination included a diagnostic interview, and objective testing
3 in the areas of effort and motivation, intelligence, academic
4 achievement, attention and concentration, visual-spatial functions,
5 speech and language, executive functioning, memory, and personality
6 (MMPI-2). The results of the MMPI-2 were found to be valid and
7 revealed that Plaintiff, who reported pain in various parts of his
8 body, had many problems dealing with stress, and this difficulty
9 "may exhibit an increase in his symptoms in response to stress."
10 (Tr. 228.) In his summary of findings, Dr. Veltkamp concluded
11 "[p]sychiatrically, Mr. Englehart is reporting a variety of
12 symptoms, including a great deal of chronic pain, as well as
13 depression and anxiety. He feels that he is not as able to work now
14 as before secondary to both his emotional and physical pain." (Tr.
15 230.) Dr. Veltkamp diagnosed an Axis I Pain Disorder Associated
16 with Both Psychological Factors and a General Medical Condition.
17 (Tr. 229.) This examining medical source opinion, from a specialist,
18 is uncontradicted.

19 Consistent with Dr. Veltkamp's findings and diagnosis, the
20 record is replete with reports of Plaintiff's problems with chronic
21 back pain, including a May 2006, report from Plaintiff's treating
22 physician that he did not believe Plaintiff would ever be "pain
23 free." (Tr. 255.) There also are imaging reports, and clinic notes
24 describing physical therapy, narcotic and non-narcotic medication as
25 treatment for Plaintiff's pain. (See, e.g., Tr. 144, 150-54, 235,
26 237, 240, 255.) Further, the ALJ found that Plaintiff's back
27 condition "could reasonably be expected to produce the alleged
28

1 symptoms," *i.e.*, pain. (Tr. 21.)

2 Although the parties discuss, and disagree upon, the exact pain
3 disorder diagnosis given by Dr. Veltkamp, the record in its entirety
4 shows that Plaintiff complained consistently of severe pain to his
5 treating and examining physicians. His complaints are consistent
6 with the diagnosis of a pain disorder and, therefore, are not
7 "groundless under the de minimis standard of step two." *Webb v.*
8 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). Because the ALJ failed
9 to reject Dr. Veltkamp's diagnosis and did not include the pain
10 disorder in her step two findings, the step two findings are not
11 supported by substantial evidence.

12 In the sequential evaluation process that follows step two, the
13 ALJ must consider the combined effect of all of the claimant's
14 impairments on the ability to function, without regard to whether
15 each alone was sufficiently severe to be disabling. See 42 U.S.C.
16 § 423(d)(2)(B) (Supp. III 1991). Crediting Dr. Veltkamp's
17 uncontradicted diagnosis of pain disorder with psychological and
18 physical components, the effects of pain should have been included
19 in the RFC determination and hypothetical question to the vocational
20 evidence. The ALJ's exclusion of all effects of pain from
21 Plaintiff's RFC is not supported by substantial evidence, is legal
22 error and is cause for reversal.

23 Because a step two determination that an impairment is severe
24 "only raises a prima facie case of a disability," Plaintiff may not
25 succeed in proving he is "disabled" as defined by the Social
26 Security Act at step two. The full five step sequential evaluation
27 is necessary to ascertain whether there are jobs Plaintiff can
28

1 perform. *Hoopai v. Astrue*, 499 F.23d 1071, 1076 (9th Cir. 2007)
2 (*citing Tackett*, 180 F.3d at 1100). As stated by the *Hoopai* court,

3 [T]he satisfaction of the step-two threshold requirement
4 that a claimant prove her limitations are severe is not
5 dispositive of the step five determination of whether the
6 non-exertional limitations are sufficiently severe such as
to invalidate the ALJ's exclusive use of the [Medical-
Vocational Guidelines] without the assistance of a
vocational expert.

7 *Id.* at 1078.

8 Conversely, a reasonable ALJ may find Plaintiff "disabled" upon
9 consideration throughout the sequential evaluation process of all
10 limitations caused by the diagnosed pain disorder in combination
11 with Plaintiff's other severe and non-severe impairments (as
12 required by 20 C.F.R. §§ 404.1523, 416.923). *Stout v. Commissioner*,
13 *Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). Because
14 Plaintiff is prejudiced by the improper exclusion of the diagnosed
15 pain disorder in the ALJ's sequential evaluation, remand for further
16 proceedings is appropriate. *Id.* at 1057. On remand, further
17 evidence may be submitted, including additional consultive
18 psychological examinations and, if necessary, medical expert
19 testimony to assist in the evaluation of psychological testing,
20 diagnoses and severity. Accordingly,

21 **IT IS ORDERED:**

22 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
23 **GRANTED**. The matter is remanded to the Commissioner for additional
24 proceedings pursuant to 42 § U.S.C. 405(g).

25 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
26 **Rec. 19**) is **DENIED**.

27 3. Application for attorney fees may be made by separate
28

1 motion.

2 The District Court Executive is directed to file this Order and
3 provide a copy to counsel for Plaintiff and Defendant. The file
4 shall be **CLOSED** and judgment entered for **Plaintiff**.

5 DATED March 18, 2008.

6
7 S/ CYNTHIA IMBROGNO
8 UNITED STATES MAGISTRATE JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28